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No. 06-949

In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. "Relatedness" Between Forum Contacts And Cause Of Action In The Context Of Specific Personal Jurisdiction

When a cause of action arises out of or relates to the *sale* of a domestic corporation to a foreign corporation, are forum contacts that are solely related to the post acquisition *operation* of the domestic corporation sufficiently "related" to the cause of action, as a matter of due process, to support a Wisconsin court's assertion of specific *in personam* jurisdiction over a non-resident employee of the foreign corporation?

2. Fiduciary Shield Doctrine

When a non-resident's forum contacts occur entirely as a representative of his employer, may a Wisconsin court base its assertion of specific, *in personam* jurisdiction on only those contacts?

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OPINION AND ORDER AT ISSUE IN THIS CASE

Druschel v. Cloeren, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006).

Druschel v. Cloeren, 2006 WI 126, 724 N.W.2d 205 (Oct. 10, 2006).

JURISDICTION OF THE UNITED STATES SUPREME COURT

a. Petitioner seeks review of a decision of the Wisconsin Court of Appeals dated August 1, 2006, where review was denied by the Wisconsin Supreme Court on October 10, 2006.

b. Jurisdiction is conferred by 28 U.S.C. § 1257(a), for an issue arising under the Fourteenth Amendment to the United States Constitution.

The judgment of the Wisconsin Court of Appeals sought to be reviewed was entered on August 1, 2006. A petition for review was filed with the Wisconsin Supreme Court and denied October 10, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Long-Arm Statute, Wis. Stat. § 801.05(1)(d):

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to section 801.11 under any of the following circumstances:
>
> (1) Local Presence or Status. In any action whether arising within or without this state, against a defendant who when the action is commenced:
>
> (a) Is a natural person present within this state when served; or
>
> (b) Is a natural person domiciled within this state; or
>
> (c) Is a domestic corporation or limited liability company; or
>
> (d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

STATEMENT OF THE CASE

Wisconsin resident Robert Druschel haled Peter Cloeren, a Texas resident, into a Wisconsin court to answer for an alleged breach of contract. Mr. Cloeren, however, has insufficient contacts with Wisconsin to subject him to the jurisdiction of a Wisconsin court.

The controversy in this case arose out of the late 1997 sale of Production Components, a Wisconsin corporation, to Cloeren, Inc., a Texas corporation.[1] Shortly before the September 1997 closing of the transaction, Mr. Druschel (a

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[1] (App. 57, R. 45 at 1.) At the time of the September 15, 1997 Stock Purchase Agreement, Cloeren, Inc. was known as The Cloeren Company. (App. 57, R. 45 at 1.) We will refer to it herein as the "Corporation." After the sale, Production Components/Chippewa Valley Die, Inc. was called Production Components – Cloeren, Inc. (App. 2; App. 57, 59, R. 45 at 2.) We will refer to it herein as simply "Production Components."

former shareholder of Production Components) insisted that Mr. Cloeren (a shareholder of the Corporation) sign the promissory notes in his personal capacity. Mr. Druschel subsequently breached his contractual obligations to Production Components, thereby giving rise to an offset against further payment of the purchase price, including the amount due under the promissory note signed by Mr. Cloeren. Mr. Cloeren stopped further payment, to which position Mr. Druschel took exception.

The Wisconsin Court of Appeals adopted an extraordinarily broad view of the Due Process Clause when it used contacts related only to the Corporation's post acquisition operation of the Wisconsin company to find personal jurisdiction over Mr. Cloeren. But Mr. Druschel's cause of action addresses, at its broadest, the *sale* of a Wisconsin corporation in 1997. Contacts related to the subsequent *operation* of the new company, therefore, cannot be said to "arise out of or relate to" the sale. Thus, Mr. Cloeren's contacts with Wisconsin (as an agent of the Corporation) resulting from operation of the company cannot serve as a basis for asserting specific jurisdiction in a case related to the sale of the company.

I. Factual Background.

A. Sale Of Production Components To The Corporation.

All shares of Production Components stock, including Mr. Druschel's shares, were sold to the Corporation on September 15, 1997. (App. 49-50, R. 30, Ex. 1; App. 58, R. 45 at 1.) As part of the payment of the purchase price, Mr. Druschel received a promissory note signed by Mr. Cloeren in his personal capacity. (App. 58, R. 45, Ex. 1.) Post closing adjustments to the purchase price led to Mr. Cloeren's execution of a replacement promissory note in favor of Mr. Druschel on February 26, 1998 (the "Replacement Note"). (App. 68, R. 45, Ex. 5.)

B. The Dispute.

Mr. Cloeren's refusal to pay the balance due under the Replacement Note was precipitated by Mr. Druschel's violation of his employment and non-compete agreements with the Corporation. (App. 48, R. 30, Ex. 1.) Mr. Druschel's breaches consisted of acting as an advisor in the formation and operation of a competing business and withholding information about an employee who solicited the company's customers on behalf of a competitor. (App. 78-97, R. 41, Ex. 7 at 114-116, 150, 159-160, 177-179; App. 53, R. 30, Ex. 1.) Mr. Druschel admits he breached his employment agreement by not notifying Production Components of these efforts to harm the company's business interests. (App. 82-84, R. 41, Ex. 7 at 150-51, 161.)

Both the Original Note and Replacement Note provide that, should Mr. Druschel breach his contractual obligations, Mr. Cloeren would be entitled to offset the resulting damages against any amounts remaining due under the notes. Mr. Cloeren exercised his offset right by refusing payment on the Replacement Note.

Mr. Cloeren filed suit in Texas to enforce his offset right. *See Cloeren, Inc. et al. v. Druschel*, Case No. B031037-C (Orange County, Texas, 163rd Judicial District Aug. 28, 2006) (the "Texas Case"). (App. 48, R. 30, Ex. 1.) Mr. Druschel responded by filing his suit in Wisconsin against Mr. Cloeren. The Texas Case remains open and stayed pending the resolution of the case at bar.

II. Mr. Cloeren's Insufficient Contacts.

There are two classes of activity relevant to the jurisdictional inquiry in this case: The first class – the sale of Production Components to the Corporation – gave rise to this cause of action. The second – the Corporation's post sale management of Production Components – has no relationship to the instant cause of action.

Because Mr. Cloeren lacked even minimal Wisconsin contacts with respect to the sale of the company, the trial and appellate courts imported contacts from the post sale

operation of the company to fill that deficit. Not only were those contacts not related to the cause of action, but they were not even contacts in Mr. Cloeren's personal capacity. Rather, his contacts with Wisconsin were in his capacity as a representative of the Corporation.

A. The Sale Of Production Components To The Corporation.

The Production Components shareholders sold their stock to the Corporation, not Mr. Cloeren. (App. 57, R. 45 at 1.) Mr. Cloeren was not the primary contact for the Corporation in those discussions, and he did not travel to Wisconsin to negotiate the terms. (App. 99-102, R. 20 at 99-104.) The deal in principal was reached without any substantive input from him. (App. 99-102, R. 20 at 99-104.)[2]

Mr. Cloeren then executed the transaction documents (on behalf of the Corporation) and the Original Note (in his personal capacity) in Texas. (App. 107-109, R. 16 at 110-111.) The Original Note specifies Texas law as governing, and shows Mr. Cloeren's address as Orange, Texas. (App. 64, 68, R. 45, Ex. 1, at 2, 4.) The Original Note is secured with shares of stock in a Texas corporation held in escrow by Orange Savings Bank. (App. 50, R. 30 at 2-3.)

The Replacement Note (upon which Mr. Druschel based his Complaint) took the place of the Original Note and, like the obligation it supplanted, designates Orange, Texas, as its site, identifies Texas law as governing, and shows Mr. Cloeren's address as Orange, Texas. (App. 71, 75, R. 45, Ex. 5 at 2, 4.)[3]

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[2] Mr. Cloeren, while not certain, believes it is possible he may have traveled to Wisconsin at one point for due diligence purposes. (App. 102-103, R. 20 at 104-105.)

[3] The Court of Appeals did not find general jurisdiction over Mr. Cloeren. Mr. Cloeren has resided in Texas for the last 25 years. (App. 111-112, R. 12, Interrogs. 1-2.) He does not have an ownership interest in any Wisconsin businesses, and he has no accounts in any Wisconsin financial institution. (App. 113-114, R. 12, Interrogs. 5, 9.)

B. Management Of Production Components After The Sale To The Corporation.

Because of the dearth of contacts between Mr. Cloeren and Wisconsin relating to the sale of Production Components, the trial and appellate courts looked to contacts related to a different transaction, to wit, the Corporation's post sale operation of Production Components. The courts borrowed the following contacts (all of which were accomplished in Mr. Cloeren's representative capacity) to fulfill the "minimum contacts" requirement: Mr. Cloeren visited Wisconsin six to eight times since 1997; spoke to one Wisconsin employee of Production Components approximately each week by telephone; spoke to another Wisconsin employee of Production Components approximately twice per month; and was involved in the management of a Texas corporation which owns a Wisconsin corporation (Production Components); and is actively involved in the management of Production Components. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006). (App. 1, 5.); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005.) (App. 25, 26.)

The Court of Appeals found these contacts should be considered regardless if they were made on behalf of a business. (App. 8.)

III. Procedural History.

Mr. Druschel filed his Complaint on September 17, 2003. (App. 41, R. 1 at 1.) Mr. Cloeren responded with a motion to dismiss for lack of personal jurisdiction. (App. 48, R. 30.)

Mr. Cloeren argued that he had insufficient contacts with the State of Wisconsin to warrant the exercise of either general or specific jurisdiction over his person. He also argued that any of his contacts with Wisconsin were strictly in a representative capacity, and did not constitute personal minimum contacts. The Circuit Court denied the

motion. *See Druschel v. Cloeren*, Order, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005) (App. 25.)[4]

Mr. Cloeren appealed the ruling on January 30, 2006, maintaining again that he lacked the requisite minimum contacts with the State of Wisconsin to support personal jurisdiction. The Court of Appeals affirmed on August 1, 2006, finding sufficient minimum contacts to support specific jurisdiction.

Both courts assessed only those contacts related to the operation of Production Components by the Corporation *after* the sale of the company. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006) (App. 1, 5, 25, 26); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005) (App. 25.) The Court of Appeals assumed, without analysis, that the cause of action related to, or arose out of, those contacts.

Mr. Cloeren timely brought his petition for review to the Wisconsin Supreme Court, asking the court to accept the case for the purpose of resolving, *inter alia*, the same two jurisdictional questions presented in the instant

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[4] At the hearing on the Motion to Dismiss, the Circuit Court found that post acquisition contacts were connected and related to the cause of action because "Cloeren failed to pay the balance on a promissory note payable to Mr. Druschel that was used to pay for stock held by Mr. Druschel in Production Components." (App. 33.) In doing so, the court espoused (*sotto voce*) a hybrid model of personal jurisdiction in which specific and general jurisdiction contacts are conflated in circumstances in which an analysis of the contacts under either of the standards independently would not confer jurisdiction. The Seventh Circuit has encountered this approach before: "[Plaintiff] argues, in effect, for a hybrid between specific and general jurisdiction where, though *all* of a defendant's forum contacts would not be relevant for minimum contacts, all of a defendant's contacts *with a specific plaintiff* would be." *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1278 (7th Cir. 1997) (emphasis in original). It also soundly condemned that approach: "We do not think, however, that using such a loose causal connection between a suit and a defendant's forum contacts as the basis for personal jurisdiction comports with fair play and substantial justice." *Id.* The court subsequently entered summary judgment against Mr. Cloeren on the merits of the case on August 29, 2005.

Petition. On October 10, 2006, that court denied the petition, making the published Court of Appeals opinion controlling law throughout the state.[5]

ARGUMENT

This petition presents a jurisdictional question identified, but not answered, by this Court in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984). This Court left open for future consideration how a court ought to determine whether a defendant's contact with a forum state is "related" to the pending cause of action for the purpose of establishing specific personal jurisdiction.[6]

The intervening years have spawned and nurtured a harmful and oft-commented upon division between the United States Courts of Appeals on how to answer that question. It is a conflict that, as one court stated as recently as 2004, "has plagued federal Courts of Appeals and has resulted in divergent rules." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99 (3d Cir. 2004).[7]

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[5] App. 39; The Wisconsin Court of Appeals published its opinion in this case on October 10, 2006. Review by the Wisconsin Supreme Court is discretionary. Wis. Stat. § 809.62(1) (2003-04).

[6] Review is, of course, a matter of judicial discretion on a writ of certiorari before this Court. With respect to both of the questions we present in this Petition, we believe the following considerations are applicable: "(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," and "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court." Sup. Ct. R. 10. Although the Wisconsin Court of Appeals is not this State's court of last resort, the Wisconsin Supreme Court's denial of the petition for review means the appellate opinion has the same state-wide precedential effect as a supreme court opinion.

[7] Commentators also have taken note of the continuing division and the difficulties it presents. *See, e.g.*, Linda Sandstrom Simard, *Meeting Expectations: Two Profiles For Specific Jurisdiction*, 38 IND. L. REV. 343, 348 (2005) ("Notwithstanding the Court's lack of direction –

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The Due Process Clause cannot serve its purpose in such a turbulent and uncertain milieu. That clause is supposed to give the average American the ability to intelligently order his affairs so that he may know where he is subject to a foreign state's jurisdiction. "The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

It is currently almost impossible to discern when one's activities will give rise to "specific" personal jurisdiction. Indeed, as discussed below, highly-experienced federal court judges cannot agree on what activities suffice for the exercise of such jurisdiction. In fact, they cannot even agree on what test to apply in making that determination. That leaves little hope for the layman as he attempts to foresee the jurisdictional consequences of his activities.

Foreseeability is the Due Process touchstone for a court's exercise of personal jurisdiction over a non-resident. That foreseeability has vanished, however, as state and federal courts developed, over the last few decades, widely disparate tests to determine when courts may exercise specific *in personam* jurisdiction. The crux of the division lies in how to determine the "relatedness" between the defendant's forum activities and the cause of action. The approaches vary greatly, ranging from a Rube Goldberg-like "but for" test, to a vague "substantial relationship" test, to a more limited and rational "proximate cause" analysis.

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or possibly because of it – lower courts and commentators have struggled to give meaning to the nexus requirement."). The current jurisdictional picture has variously been described as "unsatisfactory," a "mess," "incoherent," and "in chaos." Charles W. Rhodes, *The Predictability Principle In Personal Jurisdiction Doctrine: A Case Study On The Effects Of A "Generally" Too Broad, But "Specifically" Too Narrow Approach To Minimum Contacts*, 57 BAYLOR L. REV. 135, 139 (Winter 2005).

The practical result is that no one can be certain which, or how many, of his or her activities will confer personal jurisdiction on a foreign state. The Court should grant this petition to restore foreseeability to the application of the Due Process Clause.

This Petition also presents an apt occasion for the Court to address a closely related jurisdictional question, to wit, whether a court may exercise *in personam* jurisdiction over an individual whose only relevant contacts with a forum state are acts in a representative capacity on behalf of a corporate entity. This question is of vital importance both as a matter of federal constitutional law, and as a matter of pragmatism to the increasing number of people whose everyday business is corporate and interstate.

Because this question has not been settled by the Court, and because the lower courts are applying the due process clause in an inconsistent manner, people are left with greater or lesser constitutional protections in and among the several States. This Court should resolve the issue and end the split.

I. The "Minimum Contacts" Question The Wisconsin Court Decided Has Not Been, But Should Be, Settled By This Court.

As this Court well knows, a court may not exercise personal jurisdiction over a non-resident unless that person has "minimum contacts" with the forum state, and the exercise of jurisdiction on the basis of those contacts would be consistent with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-77 (1985); *Helicopteros*, 466 U.S. at 414; *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[8]

[8] Wisconsin's long-arm statute (Wis. Stat. §801.05) reaches to the full extent allowed by the Due Process Clause. *See Allen-Bradley Co., Inc. v. Datalink Techs., Inc.*, 55 F. Supp. 2d 958, 959 (E.D. Wis. 1999). The specific provision invoked by the Chippewa County Circuit Court

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In the context of the assertion of "specific" personal jurisdiction, the prospective defendant's contacts with the forum must evidence that (1) "the defendant has 'purposefully directed' his activities at residents of the forum," and (2) "the litigation results from the alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); *Helicopteros*, 466 U.S. at 414.

A. This Court Specifically Left Unanswered The Question Presented By This Petition.

In *Helicopteros*, this Court expressly left the meaning of the second prong of the "specific" jurisdiction analysis for future consideration:

> [W]e decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) *what sort of a tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.*

Helicopteros, 466 U.S. at 416 (emphasis supplied). This petition describes the need to resolve the second of those two questions, that is, how "related" a defendant's contacts must be to the plaintiff's cause of action.

The question of "relatedness" serves two essential purposes: "First, relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases. Second, it ensures that the element of causation remains in the forefront of the due process investigation." *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996).

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states that: "A court of this state having jurisdiction of the subject matter has jurisdiction over a person [who] . . . [i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise." Wis. Stat. §801.05(1)(d).

Lacking direction from this Court on the "relatedness" question, however, the United States Circuit Courts of Appeals have adopted a potpourri of conflicting standards, some of which serve the purposes identified by *Nowak*, some of which do not.

The differing standards are outcome determinative inasmuch as *in personam* jurisdiction may or may not exist depending upon which test the court adopts. As a result, not only does the Constitution provide differing levels of due process protection depending on a plaintiff's choice of forum, but non-residents have no way of discerning which of their actions may subject them to a foreign state's jurisdiction.

B. The United States Circuit Courts Of Appeals Are In Disarray.

The split between the United States Circuit Courts of Appeals on how to answer the "relatedness" question was already sufficiently well-developed in 1996 that the *Nowak* court could catalogue the division. The split has shown no sign of resolving since that decision. In fact, it is a division still "plaguing" the courts. *See Miller Yacht Sales, Inc.*, 384 F.3d at 99 (a 2004 case noting the division before succumbing to the plague by abandoning the effort to develop a consistent analysis).

The *Nowak* court found the Circuits generally fall into one of two basic camps. The first applies a "proximate cause" analysis, while the second employs a "but-for" test in assessing whether a defendant's activities in the forum were sufficiently related to the asserted cause of action. It also noted the existence of a nautical-themed "in the wake of" standard, and a "substantial connection" test.

1. Three Circuits Use A "Proximate Cause" Test To Analyze Due Process.

The leading proponent of the "proximate cause" approach to assessing relatedness is the United States Circuit Courts of Appeals for the First Circuit. Other

Circuits using this analytical framework include the Second and Eighth. District Courts in the Third and Tenth Circuit have also appeared favorably inclined to this standard.[9]

The *Nowak* court observed that "relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases[, and it] . . . ensures that the element of causation remains in the forefront of the due process investigation. Most courts share this emphasis on causation, but differ over the proper causative threshold." *Nowak*, 94 F.3d at 714 (internal marks and citation omitted).

The "proximate cause" standard forswears specific personal jurisdiction unless it "is premised on a contact that is a legal cause of the injury underlying the controversy – *i.e.*, that form[s] an important, or [at least] material, element of proof in the plaintiff's case. . . . " *Nowak*, 94 F.3d at 715 (internal marks and citation omitted, modifications in original). Application of this concept in the jurisdictional inquiry, however, is not as rigid as when employed in the tort context. "[W]e intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate. We think such flexibility is necessary in the jurisdictional inquiry: relatedness cannot merely be

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[9] *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 267, 268 (E.D. Pa. 1991) (In case involving personal injury claim in new Jersey from defendant's negligence, court states, "[w]hile it is true that [plaintiff] might not have visited the motor inn if [she] had not seen the defendant's brochure, the causal link between the brochures and the injury is simply too attenuated to say that the injury arose from Pennsylvania."); *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986) (Although court references but-for analysis, it concludes that "[p]laintiff's cause of action is based on Carnival's duty to exercise due care to its passengers. Such a duty was not owed plaintiff until she became a passenger upon the ship in California. Consequently, Carnival's duty to plaintiff did not originate from its activities in Kansas. Plaintiff's injury was the ending in a fortuitous course of events that began with defendant's advertising of cruises and its selling of tickets.").

reduced to one tort concept for all circumstances." *Nowak*, 94 F.3d at 715.

The First Circuit favors the "proximate cause" approach because of the emphasis on foreseeability. "[P]roximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm. Foreseeability is a critical component in the due process inquiry, particularly in evaluating purposeful availment, and we think it also informs the relatedness prong." *Nowak*, 94 F.3d at 715 (citation omitted).

The emphasis on foreseeability, the *Nowak* court observed, flows directly from this Court's teaching on Due Process Clause fundamentals:

> [The Due process Clause] requir[es] that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign. . . ." [T]his "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *and* the litigation results from alleged injuries that "arise out of or relate to" those activities.

Nowak, 94 F.3d at 715 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472) (modifications in original, emphasis supplied).

The Eighth Circuit, while not specifically labeling its test "proximate cause," agrees with the content of the First Circuit's analysis: "[T]he defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case." *United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992).[10] The court went on to

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[10] The *163 Pleasant Street* court recognized the division between the Circuit Courts and responded by developing what it called "a few, rather abecedarian precepts pertaining to the relatedness requirement." *163 Pleasant Street Corp.*, 960 F.2d at 1089. Surely a Circuit Court's confessed resort to "abecedarian" principles in answering such a fundamental constitutional question is, if nothing else, an invitation for this Court's

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explain the relationship between its test and the tort-based standard of causation:

> We have likewise suggested an analogy between the relatedness requirement and the binary concept of causation in tort law under which both elements – cause in fact (i.e., the injury would not have occurred "but for" the defendant's forum-state activity) and legal cause (i.e., the defendant's in-state conduct gave birth to the cause of action) – must be satisfied to find causation sufficient to support specific jurisdiction. In this inquiry, foreseeability is critical.

Id.

The Second Circuit agrees that, at least when contacts are few, those contacts must have proximately caused the injury of which the plaintiff complains. In *Chew v. Dietrich*, 143 F.3d 24 (2nd Cir. 1998), the court said:

> Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. . . . Where the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.

Id. at 29.

The test a court adopts to answer the "relatedness" question is tremendously important because it can be dispositive of jurisdiction. For instance, had the Wisconsin Court of Appeals applied the proximate cause test in this case, it would have stayed its hand. No court or party has ever asserted (or even suggested) that the contacts upon

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attention. Especially when those precepts conflict with ones developed by other Circuit Courts of Appeals.

which the courts relied were proximately related to Mr. Druschel's cause of action. A more liberal standard, however, such as the "but-for" test, sweeps considerably more broadly, subjecting people to the jurisdiction of foreign states based on only tenuous contacts.

2. Two Circuits Use A "But-For" Test To Analyze Due Process.

The Ninth Circuit carries the banner for the "but-for" test. In *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995), the court unabashedly expressed this standard: "We rely on a 'but for' test to determine whether a particular claim arises out of forum-related activities and thereby satisfies the second requirement for specific jurisdiction." *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995).[11]

The Ninth Circuit has explicitly recognized the outcome-determinative effect of which "relatedness" test a court adopts. In the *Shute* case, the court used the "but-for" test in approving jurisdiction over the non-resident Carnival Cruise Lines for a slip-and-fall accident occurring in international waters. The court observed:

> Were this court to apply the "arising from" analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington. Rather, we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE.

Shute, 897 F.2d at 383. The *Marino*[12] case to which the court referred is a First Circuit decision employing the

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[11] The *Ballard* court concluded, correctly we believe, that the Ninth Circuit's employment of the "but-for" test was not disturbed by this Court's reversal of *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), in which the Ninth Circuit originally adopted this standard. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

[12] *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986). The *Marino* court construed the Massachusetts long-arm statute. The Massachusetts

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"proximate cause" test described above. The *Pearrow*[13] decision (an Eighth Circuit case), adopted the substance of the "proximate cause" test, although it was not labeled as such.

The Fifth Circuit is in the "but-for" camp, although it has wavered. In *Prejean v. Sontrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981), the court claimed the "but-for" mantle in no uncertain terms: "Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a 'but for' causative factor for the tort since it brought the parties within tortious 'striking distance' of each other." *Id.* at 1270 n.21.[14] A few years later, the Circuit edged away from its commitment to that test. *See, e.g., Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) ("[T]his court has observed that merely contracting with a resident of a forum state is insufficient to subject the nonresident to the forum's jurisdiction," and although "the contractual relationship between [defendant and plaintiff] may have been cemented in Texas, the significance of this fact is diminished by the contract provision specifying that Oklahoma law would govern the agreement"). It appears to have now returned to the fold. *See, e.g., Trinity Indus., Inc. v. Myers & Assoc., Ltd.*, 41 F.3d 229, 231-32 (5th Cir. 1995) ("There would be no injury or basis for a claim but for the fact that [defendant] represented [plaintiff] in Texas").

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high court subsequently rejected the "proximate cause" test in favor of the "but-for" standard in evaluating relatedness for purposes of the statutory analysis. *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 771-74 (1995). However, the First Circuit recognized that this has no impact on the constitutional analysis. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 207 n.8 (1st Cir. 1994).

[13] *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983).

[14] *Prejean* involved the assertion of widows' tort claims against their late husbands' Algerian employer (and others) arising out of a fatal airplane accident. *Prejean*, 652 F.2d at 1264.

The *Nowak* court identified the principle weakness in the far-reaching effect of this standard: "A 'but for' requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Nowak*, 94 F.3d at 715. Far better, *Nowak* said, is the "proximate cause" analysis, which "is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation." *Id.*

3. One Circuit Uses An "In The Wake Of" Test To Analyze Due Process.

The Seventh Circuit's approach does not fit neatly into either of the two primary categories of "relatedness" tests. In substance, however, it lies closest to the First Circuit's "proximate cause" standard.

In *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272 (7th Cir. 1997), the court described its test in distinctly First Circuit-like terms: "To be relevant for personal jurisdiction, however, past contacts involving the forum state should either bear on the substantive legal dispute between the parties or inform the court regarding the economic substance of the contract." *Id.* at 1278.[15] Indeed, the court turned to a First Circuit case to find support for a robust connection between the contacts and the cause of action. "As the First Circuit put it, specific jurisdiction is not appropriate "merely because a plaintiff's cause of

[15] The plaintiff in *RAR, Inc.* advanced a personal jurisdiction argument that appears identical to the Wisconsin Court of Appeals' decision in this case. The *RAR, Inc.* court observed that the plaintiff "argues, in effect, for a hybrid between specific and general jurisdiction where, though *all* of a defendant's forum contacts would not be relevant for minimum contacts, all of a defendant's contacts *with a specific plaintiff* would be." *RAR*, 107 F.3d at 1278 (emphasis in original). The court soundly rejected that approach: "We do not think, however, that using such a loose causal connection between a suit and a defendant's forum contacts as the basis for personal jurisdiction comports with fair play and substantial justice." *Id.*

action arose out of the general relationship between the parties; rather, the action must *directly arise* out of the specific contacts between the defendant and the forum state." *Id.* (citing *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995)) (emphasis in original).

The Seventh Circuit, however, has suggested that something less than proximate cause will suffice for the exercise of specific personal jurisdiction. In assessing the Illinois long-arm statute, the court said that "[t]he [statute's] 'arising from' requirement is liberally construed – all one need be able to say is that the cause of action lies somehow 'in the wake' of the Illinois transaction." *Heil v. Morrison Knudsen Corp.*, 863 F.2d 546, 549 (7th Cir. 1988). The court was quick to note, however, that "this is not to be taken literally . . . It is not to be supposed that every time a board of directors meets, it makes waves in whose wakes causes of action float. . . ." *Id.*

The *Heil* court found that Illinois' long-arm statute did not reach the accused activity, and so there was no cause to apply the "in the wake of" standard to the Due Process Clause. But a few years previously, in *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984), the court used the same nautical metaphor in justifying the exercise of personal jurisdiction: "The discussions that took place in Illinois between [defendants] played a part in the subsequent negotiations between [defendant] and plaintiff, which led to the contract. . . . The contract under which the plaintiff is suing for breach of warranty thus lies in the wake of [defendant's] commercial activities in Illinois." *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984). It thus appears that the Seventh Circuit, while holding to some form of "proximate causation," uses the "in the wake of" metaphor to liberalize the test to some (uncertain) extent.

4. One Circuit Uses A "Substantial Connection" Test.

The Sixth Circuit rejects the proximate cause standard, but does not go as far as the "but-for" test endorsed

by the Ninth Circuit. It says that the "arising from" criterion "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities.'" *Third Natl. Bank in Nashville v. Wedge Group Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (emphasis in original).

The Sixth Circuit apparently sees this as a fusion between the "but-for" and "in the wake of" approaches. In *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir. 1988), the court considered a sex discrimination case involving the American Board of Endodontics' refusal to certify a Michigan dentist. After reviewing the Seventh Circuit's "in the wake of" test, it stated: "Clearly the cause of action herein, if one exists, arose from, was 'made possible' by, and lies in the 'wake' of the application process, much of which occurred in Michigan." *Id.* at 909.

It is possible to view this test (and, perhaps, the Seventh Circuit's test) as lying somewhere between the First Circuit's "proximate cause" standard and the Ninth Circuit's "but-for" inquiry. In the Due Process context, however, a middling approach has little merit when all it accomplishes is to further obscure what activity may subject a person to a foreign state's jurisdiction.

5. One Circuit Refuses To Adopt Any "Relatedness" Test.

The Third Circuit, at one point, hewed to an approach similar to the "proximate cause" test, but ultimately resigned the effort at constructing any particular analytical scaffold. It instead resorted to an unhelpful ad hoc determination of relatedness that contains no predictive value whatsoever.

In *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147 (3d Cir. 1996), the court considered whether the parties' contractual relationship in the 1980s (long since terminated by the time of the dispute) should count towards the necessary minimum

contacts to support jurisdiction in a case addressing an entirely separate contract executed some years later. Leaning on this Court's teaching in *Burger King*, the court said the relevant contacts are those relating to "dealings *between the parties in regard to the disputed contract,* not dealings unrelated to the cause of action." *Id.* at 153 (emphasis in original). The court found no specific personal jurisdiction.

To the extent the *Vetrotex* court adopted the proximate cause test, the Third Circuit expressly jettisoned it in *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93 (3d Cir. 2004). The court said "we do not agree that we must apply an immediate or proximate cause standard to determine whether a claim arises out of a defendant's contacts with a forum state. . . ." *Id.* at 98.

In abjuring the proximate cause test, the court took note of the void it left behind: "We recognize that our conclusion that a defendant's contacts with a forum need not have been the proximate cause of the plaintiff's injuries in a tort case begs the question of what level of relationship is necessary under the 'arise out of or relate to' requirement." *Id.* at 99-100. Its response to that vacuum was (and is) both unsettling and destructive of the core purpose of the Due Process Clause.

The *Miller Yacht Sales* court denied it had any responsibility to construct (or borrow) an analytical framework within which to decide the "relatedness" question, which it acknowledged "has plagued federal Courts of Appeals and has resulted in divergent rules." *Id.* at 100. Instead, it said: "We have not laid down a specific rule because we have approached each case individually and taken a "realistic approach" to analyzing a defendant's contacts with a forum." *Id.* at 100.

It is anyone's guess what result an ad-hoc "realistic" approach will yield in any given case. That is, after all, the point of rejecting a discernible standard. But one thing is certain – it provides no means by which a non-resident can determine whether his or her activities will give rise to

specific personal jurisdiction in the Third Circuit. This is truly justice by the measure of the chancellor's foot.

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In the context of specific *in personam* jurisdiction, the Due Process Clause no longer performs the salutary function envisioned by this Court. The sometimes vague, sometimes limitless, but ever-conflicting rules by which courts determine relatedness have defeated "the 'orderly administration of the laws. . . .'" *World-Wide Volkswagen Corp.*, 444 U.S. at 297. And the Clause no longer "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.*

The situation is intolerable and growing more so. The current disagreement amongst the United States Courts of Appeals is a sufficient reason for this Court to address this open question. The Third Circuit's recent surrender to ad hoc rulings, eschewing any guiding analytical framework, suggests the Circuit Courts are reaching a point of exasperation that augurs ill for those over whom they exercise their jurisdiction. While the Third Circuit most starkly illustrates the problem with leaving this question open, the welter of "relatedness" tests amongst the Circuits is no less corrosive of Due Process Clause protections. The Court should grant this Petition and answer the question it identified in *Helicopteros*.

II. The Fiduciary Shield Question The Wisconsin Court Decided Has Not Been, But Should Be, Resolved By This Court.

Under the fiduciary shield doctrine, "an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction." *Stuart v. Spademan*, 772 F.2d 1185, 1197-98 (5th Cir. 1985). Until the decision in this case, Wisconsin's courts had neither rejected nor accepted the doctrine, but the Seventh Circuit has treated the matter as one of state law rather than federal due process. *See Hardin Roller Corp. v. Universal*

Printing Machinery, 236 F.3d 839, 842 (7th Cir. 2001) ("Never in that state's history have its courts applied the doctrine – but neither have they definitively rejected the possibility.").

In this case, the lower courts refused to apply the doctrine, holding that state law alone applied to the issue of whether Mr. Cloeren was amenable to personal jurisdiction for actions taken purely in a representative capacity. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006) (App. 8.); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005.) (App. 25, 31.)

A. The Petition Presents A Ripe Occasion For The Court To Address The Questions Of Due Process Left Open In *Hustler Magazine*, *Calder*, *Burger King*, And *Helicopteros*.

In two companion cases issued more than twenty years ago, this Court touched briefly upon the issue of whether the due process clause permits the exercise of personal jurisdiction over a corporate representative acting, at least in part, in a representative capacity. *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1985); *Calder v. Jones*, 465 U.S. 783, 790 (1985). The Court had no need to dwell on the issue because the defendant in each of those cases had individual, as well as representative, contacts with the forum at issue.

Post-*Hustler* and *Calder*, the issue has brewed in the courts below, and has been most problematic where a defendant's contacts are *entirely* representative in nature. Because neither *Hustler Magazine* nor *Calder* dealt with the scenario where the contacts are entirely representative, the lower courts have split in analyzing the issue.

Some courts view representative contacts as part and parcel of a federal due process analysis, and ask whether basing personal jurisdiction upon contacts made in a representative capacity comports with traditional notions of fair play and substantial justice. These courts apply the fiduciary shield doctrine, and find that the due process clause would be offended if contacts made in a representative capacity alone were sufficient to establish jurisdiction

over the person as an individual. Other courts, however, outright reject the notion that contacts in a representative capacity should be viewed any differently – for due process purposes – than contacts made by an individual personally. Still other courts consider representative contacts to be a matter of equity under state law, and therefore do not evaluate the issue under the Due Process Clause at all.

B. The Court Should Further Define The Circumstances Under Which An Employee Acting In A Representative Capacity May Reasonably Expect To Be Haled Into Court On An Individual Basis.

In assessing the fiduciary shield doctrine, courts have relied on a brace of this Court's opinions issued more than twenty years ago. *See Hustler Magazine*, 465 U.S. 770 and *Calder*, 465 U.S. 783. *Calder* involved journalists writing for the National Enquirer Magazine, and *Hustler Magazine*, it could go without saying, involved another publication of questionable repute.

In *Calder*, the Court's analysis turned upon the ultimate inquiry in any personal jurisdiction case: whether the defendant personally, reasonably should have anticipated being haled into court in the forum state. 465 U.S. at 789-90. The defendants in *Calder* – who wrote for the *National Enquirer* – published an allegedly defamatory article on California actress Shirley Jones. *Id.* at 784. When Ms. Jones sued them in a California court, the journalists claimed that the court lacked jurisdiction over their persons since they were merely acting for the paper, and not in their individual capacities. *Id.* at 789.

The Court rejected this defense as a factual matter, not as a matter of law. The Court noted that the reporters' personal "byline" appeared on the published article, *id.* at 785, and thus the "journalistic" piece at issue possessed a personal character.

With regard to their status as employees, the Court noted only that it did not "somehow insulate them from jurisdiction" and re-emphasized the fact that "[e]ach

defendant's contacts with the forum state must be assessed *individually*." 465 U.S. at 790 (emphasis added). *Calder* supports the simple proposition that an employee's actions that possess an individual (as opposed to purely representative) character will not be ignored merely because the defendant is a corporate agent; but *Calder* does not hold that contacts of a purely representative nature are sufficient to satisfy due process.

In *Hustler Magazine*, the companion case to *Calder*, the Court reversed a lower court's decision that it did not have jurisdiction over a corporate publisher in a libel suit. In *Hustler Magazine*, the Court discussed whether the individual owner and publisher of the magazine might also be subject to jurisdiction:

> In *Calder* . . . we today reject[ed] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity. But jurisdiction over an employee does not automatically flow from jurisdiction over the corporation which employs him.

Hustler Magazine, 465 U.S. at 781 n.13.

Far from announcing a per se rule that employees should be subjected to individual jurisdiction for contacts arising out of performing their job for a corporation, *Hustler Magazine* and *Calder* support the unremarkable proposition that a defendant's actions also possessing an individual (as opposed to purely representative) character will not be ignored merely because the defendant is an employee.

Unanswered by either case, of course, is whether a representative's contacts that are purely representative are sufficient to establish jurisdiction over his person individually. Some courts have cited to *Hustler Magazine* and *Calder* and answered "Yes." Others have cited the same two cases and answered "No." Others sit somewhere in between. This case presents a ripe opportunity for the Court to provide the proper analytical framework for the lower courts to follow.

C. The Lower Courts Give Conflicting Answers To This Constitutional And Jurisdictional Question.

1. Jurisdictions Holding That Representative Contacts Do Not Count.

Many courts recognize that subjecting a defendant to *in personam* jurisdiction for contacts made in a purely representative capacity will often be fundamentally unfair, and therefore discount those contacts in the due process analysis. These courts consider the fiduciary shield doctrine "to be an important sub-issue under a due process analysis." *Saktides v. Cooper*, 742 F. Supp. 382, 385 (W.D. Tex. 1990). Succinctly stated:

> Considering a defendant's purely representative contacts from a due process standpoint, it would offend traditional notions of fair play and substantial justice to force employees who have occasion to do business by telephone or mail with any given number of states, to require that they defend lawsuits in those states in their individual capacity based on acts performed not for their own benefit, but for the benefit of their employer.

Saktides, 742 F. Supp. at 387.

Several Circuit Courts of Appeal have considered the matter as one that must follow "traditional lines of [a] due process analysis." *Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1065 (4th Cir. 1983); *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 92-93 (2d Cir. 1975); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1280-81 (10th Cir. 1969).

In *Weller*, the Sixth Circuit long ago expressed "serious doubt" that personal jurisdiction over corporate officers acting in a representative capacity would be fundamentally fair under the Due Process Clause. *Weller*, 504 F.2d at 931. In *Wilshire Oil*, the Tenth Circuit did the same. *Wilshire Oil*, 409 F.2d at 1280-81.

Because "the fiduciary shield doctrine and the due process clause are animated by a similar concern for fairness," *McClelland v. Watling Ladder Co.*, 729 F. Supp. 1316, 1321 (W.D. Okla. 1990), other courts have concluded that personal jurisdiction over a person acting in a representative capacity does not comport with the notions of fair play and substantial justice. *See Violanti v. Emery Worldwide*, 847 F. Supp. 1251, 1256 (M.D. Penn. 1994); *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1426 (D. Nev. 1994); *McClelland*, 729 F. Supp. at 1321; *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 162-63 (D.C. App. 2000).

2. Jurisdictions Holding That Representative Contacts *Do* Count.

Other courts reject the notion that contacts made in a representative capacity should be given any lesser weight than those contacts made in an individual capacity. These courts subject a representative to personal jurisdiction even though his only contacts with the forum are made in a representative capacity for a corporate entity. These jurisdictions treat this as a matter of *state* law, rather than as a Constitutional due process matter.

The Ninth Circuit, for example, has held that representative contacts are to be viewed as a matter of "equity." *See Davis v. Metro Prods., Inc.*, 885 F.2d 515, 521 (9th Cir. 1989) (applying Arizona law and holding that jurisdiction is not "equitably limited") (citing *Calder* and *Hustler Magazine*). The New York Court of Appeals considers the issue one of "public policy." *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 47 (N.Y. 1988).

Other courts, such as the Eastern District of Arkansas and the Eastern District of Michigan, cite to this Court's decisions in *Calder* and *Hustler Magazine,* but still treat the matter as one of state law. *Torchmark Corp. v. Rice*, 945 F. Supp. 172, 176 (E.D. Ark. 1996); *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 844 (E.D. Mich. 1994). *Torchmark* holds that the fiduciary shield doctrine

is simply a "state imposed limitation" that was "removed by the [Arkansas] legislature." *Id.*

Some courts simply fail to afford the doctrine constitutional significance. *See, e.g., Springs Indus., Inc. v. Gasson*, 923 F. Supp. 823, 826 (D. S.C. 1996); *Estabrook v. Wetmore*, 529 A.2d 956, 957 (N.H. 1987); *Norkol/Fibercore, Inc. v. Gubb*, 279 F. Supp. 2d 993, 996 (E.D. Wis. 2003); *Shipley Co. v. Clark*, 728 F. Supp. 818, 821 (D. Mass. 1990); *Seiber v. Campbell*, 810 So.2d 641, 645 (Ala. 2001); *Taylor-Rush v. Multitech Corp.*, 265 Cal. Rptr. 672, 681 (Cal. Ct. App. 1990).

The District of Delaware has predicted that the Delaware Supreme Court would refuse to recognize the fiduciary shield doctrine, though it also recognized that "constitutional fairness concerns" must have their proper role. *Mobil Oil Corp. v. Advanced Envtl. Recycling Techs., Inc.*, 833 F. Supp. 437, 442-43 (D. Del. 1993).

The Kansas Supreme Court is dismissive of the doctrine, holding that jurisdiction over a non-resident corporate representative "is predicated merely upon jurisdiction over the corporation itself." *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 468 (Kan. 1991). Likewise, the Supreme Court of Nebraska has held that – purely as a matter of Nebraska law – personal jurisdiction will lie "regardless of the capacity" in which a defendant has acted. *Holste v. Burlington Northern R.R.*, 592 N.W.2d 894, 909 (Neb. 1999).

3. Other Courts Are Unsure Whether The Rule Is One of State or Federal Constitutional Law.

Other courts somehow view the rule "as an equitable principle," *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 384 (D.N.M. 1984), but nevertheless apply it as one of constitutional dimension. *Id.* at 388 (citing *International Shoe* and *Helicopteros*). Still other jurisdictions use a state law "fairness" test that would mirror a federal due process analysis. *See Marine Midland Bank v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981); *Doe v. Thompson*, 620 So.2d 1004,

1006 (Fla. 1993); *Rollins v. Ellwood*, 565 N.E.2d 1302, 1318 (Ill. 1990). At least one other jurisdiction recognizes the existence of the doctrine, but does not know when it applies, except "in very unusual circumstances that we cannot presently foresee and articulate." *Christian Book Distrib., Inc. v. Great Christian Books,* 768 A.2d 719, 733-34 (Md. App. 2001).

Where the rule governing such a fundamental question of due process and personal jurisdiction cannot be foreseen or articulated, it is in need of repair. This Court may provide the lower courts with guidance on the issue and put an end to the divergent applications of what should be a more simple rule.

D. Why It Is Important To Resolve This Question?

A critical element of a due-process, minimum-contacts analysis is that the exercise of jurisdiction be foreseeable to the defendant; in other words, "the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 296. "[I]n each case . . . there must be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

These basic elements of minimum contacts are lacking where an individual's only contacts with a forum are in a representative capacity, as the person's contacts are not truly his own, but rather are those of his employer. Because none of the defendant's representative acts are his own, they do not amount to the purposeful transaction of business by that defendant individually.

The question left unresolved by *Burger King*, *Helicopteros*, and *Carnival Cruise Lines* is directly related to whether contacts in a purely representative capacity may be attributed to an individual for purposes of personal jurisdiction, as *Burger King* itself referred back to *Hustler*

Magazine in discussing this issue. *See Burger King*, 471 U.S. at 472 (citing *Hustler Magazine*, 465 U.S. at 774). Indeed, the Court has never expounded upon how these factors, or the notions of fair play and substantial justice, should be measured where a person's contacts are in a purely representative capacity.

The Court should clarify how jurisdiction over Mr. Cloeren fits into the statements in *Hustler Magazine* and *Calder* that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him" and that while an employee *qua* employee is not "somehow insulate[d] from jurisdiction" nevertheless his "contacts with the forum state must be assessed *individually*."[16] This case presents a ripe opportunity for the Court to provide the proper analytical framework for the lower courts to follow.

CONCLUSION

For all the reasons stated above, Mr. Cloeren respectfully asks this Court to grant his Petition.

Respectfully submitted,

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[16] *See Hustler Magazine*, 465 U.S. at 781 n.13; *Calder*, 465 U.S. at 790.